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In the Supreme Court of the United States

OCTOBER TERM, 1959

DOMINICK MARCONE, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 29-33; R. 251a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1960 (Pet. 34-35; R. 256a). The petition for a writ of certiorari was filed on March 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's acquittal on a substantive narcotics charge precluded his conviction at the same trial on a conspiracy charge in the same indictment supported by additional evidence.

2. Whether there was sufficient evidence to show petitioner's participation in a continuing conspiracy.

3. Whether comments of the trial judge to the jury with respect to a request for the reading of the entire testimony of a witness were proper.

4. Whether petitioner was prejudiced by the sending to the jury of the indictment bearing the names of co-defendants severed from trial.

STATEMENT

A two-count indictment returned on March 6, 1958, in the United States District Court for the Southern District of New York charged petitioner and others with narcotic violations. Count one alleged that on January 30, 1958, petitioner and one Capalbo sold 17 ounces and 181 grains of heroin, knowing the drug to have been illegally imported in violation of 21 U.S.C. 173, 174. Count two alleged that the same two men, from January 1, 1958, to the date of the indictment, conspired with five others to sell an unknown quantity of narcotic drugs in violation of those provisions (R. 6a-8a). Capalbo entered a plea of guilty as to both counts. Petitioner went to trial with Sacco and Noio, two co-defendants named in the conspiracy count.[1] A jury found all three guilty on the conspiracy

[1] The charges against the others named in the conspiracy count, Barra, Grecco and Mazzie, were severed.

count but acquitted petitioner on the substantive count. Petitioner was sentenced to imprisonment for eight years (R. 239a-240a). On appeal, petitioner's conviction was affirmed. The judgments as to Sacco and Noio were reversed on the government's concession that the evidence was insufficient to support their convictions.

The evidence pertinent here, developed through the testimony of federal narcotic agents, was as follows: Yannello, a narcotic agent professing to be interested in a purchase of narcotics, met Capalbo in California. The two men traveled to New York in search of a supply, arriving by plane on the morning of January 29, 1958 (R. 19a). While Yannello waited in an apartment, Capalbo telephoned him several times stating that he was seeing different people and that he could get the narcotics (R. 21a). During that period Capalbo spent over three hours at petitioner's residence (R. 95a). Sometime after 10:00 p.m. that evening, Capalbo, driving a car, picked up Yannello. Yannello gave him $7,000. The two men then entered another car driven by petitioner. Petitioner was introduced to Yannello as "Danny" (R. 21a). Capalbo immediately asked petitioner if he brought the "stuff" with him. Petitioner replied in the negative, saying that they would have to go and get it (R. 22a). Petitioner inquired about the length of time that Capalbo had known Yannello and indicated that until he got to know Yannello better, he and Capalbo would have to drive without him. They let Yannello out of the car with a promise that Capalbo would come back to him. At 11:25 p.m., Capablo re-

turned with a bag containing a half kilo of nearly pure heroin (R. 23a; 126a).

After returning to California, Yannello and Capalbo discussed future deals. Capalbo said that next time they would go to "Danny" (petitioner) whom he had characterized as a very close friend (R. 28a) but that "Danny" would go to others to get the narcotics (R. 30a). On February 11, 1958, Yannello and Capalbo took a second flight to New York in search of another half kilo of heroin which the agent pretended to want (R. 31a-32a). Arriving at 7:45 the next morning, Capalbo immediately called and then visited "Danny" (R. 33a, 83a, 97a). Yannello, after giving Capalbo $6,700, waited at an apartment (R. 33a, 34a). Petitioner and Capalbo drove around the city for some time during which they met with Grecco and Mazzie. At 2:30 p.m., Yannello received a call from Capalbo saying that "they" were having trouble and that "[s]omething was fishy" (R. 34a). At 8:00 p.m., Capalbo and petitioner, very excited, entered the apartment where Yannello waited. They said that they had "picked up heat" or were being followed (R. 35a). Petitioner wanted to know if Yannello had told anybody about the deal (R. 85a); he said that he had information that one of the the cars following them belonged to the federal government (R. 35a). Capalbo subsequently informed Yannello that the deal was off and that he had made arrangements whereby narcotics would be sent to him in California (R. 35a).

Returning to California, Yannello continued to meet with Capalbo regarding the procurement of heroin (R.

36a-41a). Yannello refused to go back to New York (R. 38a, 41a). On February 20, 1958, Capalbo told Yannello that people were coming in from New York the next day with the narcotics he wanted (R. 41a-42a). On February 21, 1958, co-defendants Sacco and Noio were apprehended by agents after they arrived in California from New York with a bag of flour intended to be passed off as heroin (R. 100a-122a).

ARGUMENT

1. Petitioner contends that his conviction on the conspiracy count was improper in view of his acquittal on the substantive count of the same indictment. He advances what the court below correctly termed a false premise—the assumption that the sole proof of the conspiracy rested upon facts developed in support of the substantive offense of January 29th (Pet. 16, 18, 21). As the court below pointed out, that is not so.

In an attempt to minimize the evidence of his incriminating conduct with Capalbo on February 12th, petitioner recites his own testimony to show that he was not implicated in the narcotic deal but was simply accompanying Capalbo as an old friend (Pet. 17). That ignores altogether the testimony of the federal agents, presumably accepted by the jury, of the incriminating statements made by petitioner concerning the narcotic deal and establishing his participation. That evidence alone was more than sufficient to support a finding that petitioner was a member of the alleged conspiracy and justified the admission against petitioner of the declarations of Capalbo that petitioner was the middleman in procuring the heroin (R. 30a).

Petitioner's reliance on *Sealfon* v. *United States*, 332 U.S. 575, 578, is misplaced for this and even more basic reason. In *Sealfon*, the defendant had been acquitted on a conspiracy charge and was thereafter tried, at a separate trial, on a substantive charge that was proved by identical basic facts. The Court held that the first acquittal, because of the identity of the "facts essential to conviction" in the two charges, was *res judicata* as to the facts sought to be proved at the second trial. Here, however, the two counts were tried together and the verdict on both entered simultaneously. Neither could be *res judicata* of the other, and the most that can be claimed is that the single verdict was internally inconsistent. Consistency in a verdict is not required (*Dunn* v. *United States*, 284 U.S. 390),[2] however, and the *Sealfon* doctrine simply has no application to different counts in the same indictment or to consolidated indictments tried together by the same jury. *Ross* v. *United States*, 197 F. 2d 660 (C.A. 6), certiorari denied, 344 U.S. 832; *United States* v. *Rainone*, 192 F. 2d 860 (C.A. 2); *United States* v. *Coplon*, 185 F. 2d 629, 633 (C.A. 2), certiorari denied, 342 U.S. 920; *United States*,

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[2] The Court quoted with approval the language of Judge Learned Hand in *Steckler* v. *United States*, 7 F. 2d 59, 60 (C.A. 2): "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." Mr. Justice Holmes concluded: "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters" (284 U.S. at 393-394).

denied, 335 U.S. 811; Robinson v. United States, 175 v. *Petti*, 168 F. 2d 221, 224 (C.A. 2), certiorari F. 2d 4, 9-10 (C.A. 9), certiorari denied, 338 U.S. 832. See also *Shayne* v. *United States*, 255 F. 2d 739 (C.A. 9), certiorari denied, 358 U.S. 823; *Pilgreen* v. *United States*, 157 F. 2d 427, 428 (C.A. 8).

2. There is no merit to petitioner's contention that the evidence was insufficient to show his participation in a continuing conspiracy. The facts showed him to be a close associate of Capalbo, whom the latter relied upon in making contacts with sources of narcotic supply. On both of Capalbo's visits to New York in search of heroin, it was petitioner whom he called (R. 33a, 83a, 97a). The agents' observations of petitioner's movements coupled with his conversation with the agents on February 12 (R. 85a) gave ample proof of his participation in the conspiracy up through the first weeks of February. There was also evidence that there was a continuing understanding that, after the unconsummated sale of February 12th, petitioner was to furnish Capalbo's telephone number to possible sources of supply (R. 38a). The fact that the evidence failed adequately to show that co-defendants Sacco and Noio were connected with the conspiracy has no bearing on petitioner's position. Even if the testimony as to those two men—showing their arrival in California on February 21st with a sack of flour intended to be passed off as narcotics—be considered as a separate conspiracy,[3] that evidence could not have prejudiced petitioner whose conviction rests on evidence of his own acts.

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[3] Petitioner denied knowing Sacco or Noio (R. 189a). Sacco denied knowing petitioner (R. 191a).

3. Petitioner's representation that the trial court refused to permit the reading of testimony requested by the jury for the reason that it was too time-consuming is misleading. The testimony requested to be read was that of Agent Yannello, the government's chief witness. The record shows that the court was concerned lest the reading of this particular testimony unduly influence the jury. He admonished the jury that it must consider the case as a whole. He remarked that Agent Yannello's testimony would take several hours to read but observed that if the jury insisted it would be well to indicate a particular part so that the reading would not take up the entire time. He left the decision to the jury but indicated that it would be preferable if it could recall the testimony of all the witnesses rather than having the testimony of any particular witness read (R. 233a-234a). The court's action was designed to protect the interest of the defendants. Petitioner has no cause for complaint.

4. There is no merit in petitioner's contention that he was unduly prejudiced because the indictment given to the jury bore the names of certain defendants severed from trial. The jury knew that others not on trial had been charged in the conspiracy count. At the very beginning of trial the names of Barra, Greeco and Mazzie were mentioned in the opening statement of government counsel summarizing the indictment, without objection from petitioner (R. 12a). The names of Greeco and Mazzie were again brought before the jury in testimony which showed them to be men whom petitioner met on February 12, a day when he and Capalbo were allegedly looking for a supply of heroin (R. 98a).

Any impression, therefore, in the minds of the jurors as to an association between these men and petitioner had a basis in fact in uncontradicted testimony, not in the bare allegation of the indictment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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